## SUBJECT INDEX



## INDEX OF AUTHORITIES REFERRED TO

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 198

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

vs.

CENTRAL IRON & COAL COMPANY,
Defendant in Error.

## SUPPLEMENTAL BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

After the date for the hearing of argument in this case was set, we were advised by wire that the date had been put forward, and we were under the necessity of closing our original brief hurriedly, and without therein considering the points in the case as we had desired and intended to do. And after reaching Washington at the time of the former setting of the case, counsel for plaintiff in error served on us a supplemental brief on their side of the case.

We, therefore, beg, and hope that the Court will permit us to file this, by way of supplement to our former brief in the case.

To resume the consideration of the cases cited in the brief of counsel for plaintiff in error, and the authorities on which these cases are based:

In the case of Penn. R. R. Co. vs, Titus, 216 N. Y., cited in the case of Pittsburgh & C. R. Co. v. Fink, the Court of Appeals of New York say:

> "In the absence of something indicating the contrary, the consignee of goods is presumed to be the owner."

And in Rosenbush v. Bernheimer, 211 Mass. 146, the Supreme Court of Massachusetts say:

> "It is evidence of ownership that one is named as consignee in a bill of lading."

And in Holt v. Westcott, 43 Me. 445, where the consigner was held liable for freight, the first head note is:

> "In all cases where goods are shipped by a consignor under a contract or for his benefit, he is originally liable for freight."

and the Court quote with approval the following extract from Parsons on Mercantile Law:

> "If the bill of lading requires delivery to the consignee or his assigns, (he or they paying the freight), which is usual, and the master delivers the goods without receiving freight, which the consignee fails to pay, the master or owner can not, in the absence of an express contract, fall back on the consignor and make him liable unless he can show that the consignor actually owned the goods; in which case, the bill of lading, in this re-

spect, is nothing more than an order by a principal upon an agent to pay money due from the principal."

And in Blanchard v. Page, 8 Gray, 281, the Court cite and quote from a number of cases holding that the true relations of the nominal parties to a bill of lading may be shown by parol testimony outside the bill itself, and finally says:

> "And further, we think evidence aluinde is admissible to prove the facts not inconsistent with the terms of the written instrument. As, for instance, where the bill of lading imports 'shipped by A. B.', it may be shown that A. B. was the agent of C. D., or that the goods were shipped by his order or for his use, because not inconsistent with the fact, that the actual shipper did make the contract, and made it in his own name. In discussing this question, therefore, and in deciding who was the proper party to bring the suit, it seems to us, that we may with propriety take into consideration the facts as stated in this case, in connection with the bill of lading, as competent evidence, not for the purpose of proving a parol agreement, different from that expressed in writing, or that the parties meant and intended something different; but to prove the relations in which they stood, and the circumstances by which they were surrounded, in order to give full effect to the terms of the instrument."

In Atlas S. S. Co. v. Columbian Land Co. (C. C. A. 2nd Circuit) 102 Fed. 358, the defendant appellee, defended on the sole ground that, by accepting the note

of the consignee for the freight, the steamship company had released it, the shipper. There the Circuit Court of Appeals of the Second Circuit say:

> "The appellant (meaning evidently appellee) a corporation doing business at Santa Marta, South America, **was the owner of the cargoes,** and, concededly, was indebted to the libellant for the amount, and remains indebted, unless its liability was extinguished by the act of the libellant in receiving the negotiable paper of Hoadley & Co., consignees of the cargoes, upon delivery of the cargoes to them. The consignees were the selling agents of defendant, **which was shipper and owner."**

In the case of Boston & M. R. R. v. National Orange Co., (232 Mass 351), 122 N. E. 313, where the Supreme Judical Court of Massachusetts holds that the fact that the carrier gave credit to the consignee and did not inform the shipper that the consignee was in arrears, did not work an equitable estoppel against the carrier depriving it of the right to collect the freight from the shipper, that Court say:

> "Railroad's right to recover freight charges from shipper does not depend on what may have been the legal effect of relation as between shipper **and its agent, the consignee; the shipper, as owner, still remaining primarily responsible."**

And the opinion in that case states:

> "The defendant, while conceding that the plaintiff has transported and delivered

the goods shipped under ordinary bills of lading, **in which it was named as owner,** and that the freight remains unpaid, contends that it is released, &c."

and also the bill of lading contains the provision:

> "The owner or consignee shall pay the freight and all other lawful charges, and if required shall pay the same before delivery," and the Court say: "The Clerk (of plaintiff, the delivering carrier) had no authority to waive this provision of the bill of lading;"

All showing that it was **as owner of the goods** that the Court held the defendant, shipper, liable in this case.

In Gt. Nor. Ry. Co. v. Hocking Valley Fire Clay Co. (Wis) 166 N. W. 41, the facts were essentially different from those in the case at bar. There, the bill of lading was a straight one, in which the Hocking Valley Company appeared as shipper (and for aught that appeared, was the owner of the goods), and there was in that case nothing indicating that there was a third party who was the owner of the goods, and for whom the service of carriage was to be performed.

That distinguishes that case from this, where it appeared from the bill of lading that Tutwiler & Brooks were the owners of the goods, and that it was for them, and on their account that the service of carriage was to be, and was being performed.

In Chicago I. & L. Ry. Co. v Peterson (Wis.) 169 N. W. 588, the defendants were at once, **the owners** of the potatoes in question, and also both **consignors**

**and consignees** in the bill of lading; and furthermore, under their contract with Wilkinson, the party to be notified, they were to pay the freight.

There, the defense was an alleged custom that the carrier should collect freight from the party to whom it delivered goods. The Supreme Court of Wisconsin say:

> "To give effect to the alleged custom among shippers of potatoes and railway companies requiring consignee to pay freight charges before delivery would be to place defendant shippers of potatoes in a more favorable position than shippers in the same locality of other kinds of merchandise in whose favor no such custom existed; contrary to the Interstate Commerce Law."

It also says that in bills of lading such as those above, the consignor is primarily liable for freight.

In B. & O. S. W. Ry. Co. vs. New Albany Box & Basket Co., (Ind.) 94 N. E. 906, the defendant was the manufacturer **and owner** of the baskets, and contracted to sell them at a fixed price **delivered at Hudson, New York.** It arrived at the price at which it would sell its baskets by adding to its factory price, the amount which plaintiff's agent informed it was the freight from New Albany to Hudson. In this the agent erred—understating the amount. The defendant, upon the basis of this information, fixed a price on the baskets, instructed the purchaser to pay the freight, deduct it from the purchase price, and remit it the balance:—which the purchaser did.

It turned out that the agent of the initial carrier

had made an error in informing defendant as to the amount of the freight, and the agent of the delivering carrier had collected from the purchaser less freight than was due, leaving unpaid the balance for which the carrier sued defendant. So, here it was the defendant who owed, and was liable to pay, and intended to pay the freight, and it was only as its agent that the purchaser, consignee, paid what he did on account of the freight; and the only point deceded is that the carrier's agent misinformed the defendant as to the amount of the freight, did not relieve it from liability for the true amount.

In Atchison, T. & S. F. Ry. Co. vs. Stannard, (Kans.) 162 Pac. 1176, the defendant and shipper was the owner of the nursery stock in question, and delivered it to the carrier for shipment to a party in Pennsylvania, who declined to accept it or pay the freight on it.

The defendant set up as a defense an alleged understanding with the Railroad Company to the effect that the carrier should act as the agent of the consignee, should see that the latter paid the freight, or if not, to promptly notify defendant; and that in this case it failed to do so.

In that case, the Supreme Court of Kansas say:

> "Since the shipper is the person who deals with the railway company and the one who induces the carrier to perform the transportation service, he is liable absolutely."

It is clear that while this was true in that case, it certainly is not true of the consignor in every case, or in the case at bar.

In Jelks v. Phila. & Reading Ry. Co., (Ga.) 80 S. E. 216, the defendant, consignor, sold the melons in question to the consignee at a fixed price f. o. b. Tyty, Ga. **The consignee declined to accept, and did not accept the melons,** on the alleged ground that they were not of the quality ordered, and declined to pay the freight.

The carrier sold the melons in strict accordance with law, and sued the consignor for the deficit. In that case, the Court of Appeals of Georgia say:

> "So far as the carrier is concerned, the consignee is regarded as the agent of the shipper, to pay the freight, and if he fails to pay, the consignor must take the consequences."

This language would never have been employed in reference to a consignor who sustained to the goods the relation which this defendant sustained to this coke; or where the bill of lading was in the form of these, and the facts such as those in the case at bar.

In Nor. Pac. Ry. Co. v. Pleasant River Granite Co., (Me.) 102 Atl, 298, the stone-working lathe **was the property of the shipper,** and was sold by it to the consignee. The Court say that the defendant claimed that the machine was the property of the consignee at the time it was loaded on the car, and there was considerable testimony on one side and on the other, on this point; but that the carrier's contract and right to recover compensation for his services arise from the circumstances of his employment. He has the right to look for his compensation, to the party who required

him to perform the service;" citing Holt v. Westcott, and Wooster v. Tarr.
And the Court there say:

> "And it does not appear that the carrier had any information concerning negotiations between consignor and consignee as to the sale of the property from the former to the latter."

The bill of lading was in standaard form, signed by the defendant and by the agent of the initial carrier, naming the consignee, the destination of the shipment and describing the property shipped. In this case, the main, if not the only question was, whether the condition written on the back of the bill of lading "owner or consignee shall pay the freight and all other lawful charges accruing on this property, and if required, shall pay the same before delivery," had the effect of exempting the consignor from liability. The consignor's relation to the property and to the transaction were such as to make it liable.

In Coal & Coke Ry Co. v. Buckhannon River Coal & Coke Co., (W. Va.) 87 So. 376, while the coal in question was sold by the defendant to Hite & Rafetto, brokers, it was consigned to J. K. Dimmick and Company, to whom Hite & Rafetto had sold it, and in the bills of lading the defendant appeared as consignor, and J. K. Dimmick & Company as consignees. This was not an "Order" bill of lading, and, besides the carrier, there were to it only two parties, namely:— the consignor and the consignee.

It did not appear from the bills of lading, or otherwise, to the carrier, that it was to or for any one other

than the defendant that it was performing the service of transportation and the Court draws attention to the fact that the bills of lading "Do not purport to be made by defendant as agent for the consignee." Therefore, that case is no authority or precedent here. It is further to be noted that in that case, the delivering carrier had made every effort to collect from the ultimate consignee, whose bond it had to secure freight to become due it, but the consignee had become insolvent, and owed the delivering carrier the full amount of the bond, and an additional sum, which had not been paid.

In Bush, Receiver, v. Keystone Driller Co., (Mo.) 199 S. W. 597, the defendant was both the **owner of the goods, and also both the consignor and consignee in the bill of lading.** Furthermore, while the plea to which demurrer was sustained alleged that the ultimate consignee was solvent at the time the goods were delivered to it, it further stated that it had become insolvent before the suit was filed.

In Yazoo & M. V. Ry. v. Picher Lead Co., (Mo.) 190 S. W. 386, the defendant was the **owner of the lead shipped,** and at the request of a commission company to which it had sold it, shipped it from Joplin, Mo., to a purchaser from the commission company at Clarksdale, Miss.

In the bill of lading (which seems to have been a standard, straight one) the defendant was the consignor, and the purchaser at Clarksdale the consignee, and no other party appeared in it. There was no evidence, either in or outside of the bill of lading, indicating that the consignor was not, or that any other person was, the owner of the lead.

In Waters v. Pfister Vogel Leather Co., (Wis.) 186 N. W. 173, the defendant was the consignee, and accepted the goods, and thereupon paid what was then thought to be the correct amount due, and the holding was simply that, by accepting the goods, they became liable for the true amount due.

In the case of So. Ry. Co. v. So. Cotton Oil Co., (Ga.) 91 So. 876, there is no opinion, and no statement of facts, but simply a syllabus, stating:

> "A railroad company, which through mistake or negligence has failed to collect from a consignee the charges due for transportation, is not estopped from recovering them from the consignor merely because of failure to sue therefor until after the consignee (who by agreement with the consignor is liable for the freight) has become insolvent."

The bill of lading is not set out, nor is there any statement of its form or contents, nor is the relation of the consignor to the goods or the transaction shown otherwise than as above.

In N. Y. Cent. R. Co. v. Warren Ross Lbr. Co., (N. Y.) 13 N. E. 324, the defendant was both the **owner and the consignee** of the goods, and it was for it that the service of carriage was performed. Also the party to whom the plaintiff was directed by the defendant to deliver, and to whom it did deliver the lumber, was insolvent.

In the case of Cent. of Ga. Ry. Co. v. B'ham Sand & Brick Co., 9 Ala. Ap. 419, the defendant purchased the sand in question at, and was to pay the freight

from Bull Creek, Georgia. The plaintiff collected from the defendant, who willingly paid, as the party owning it, upon delivery of the sand at destination, the freight thereon according to the rate inserted by plaintiff's agent at the initial point, in the bill of lading.

The only point decided is that the fact that plaintiff's agent undertook to grant, and inserted in the bill of lading, a rate less than the true rate, did not estop it from claiming, or constitute a defense to the defendant in an action by the carrier to recover, the difference between the amount paid and the amount due according to the lawful rate.

In the case of N. Y. Cent. Ry. Co. v. Phila. & R. Coal Co., 286 Ill. 267, the car of coal in question was "delivered in Pennsylvania to a carrier, on Feb. 14, 1912, by the defendant, Coal Company, consigned to itself at Chicago. At Buffalo the coal was delivered (by a preceding connecting carrier) to the plaintiff, which transported it to Chicago, where it arrived Feb. 19, 1912. On Feb. 20, 1912, defendant by an order, in writing, directed that it be forwarded to A. F. Cook & Co., who had purchased the same and agreed to pay the freight thereon, at Pullman, Illinois, via Ill. Cent. R. R., the order stating "charges follow." The delivering carrier delivered the coal to Cook & Co., the purchasers, without collecting the freight charges, and the suit was against Phil. & R. Co., **which was, at once, owner, consignor and consignee;** and under this state of facts, that Court say:

"Under all the authorities appellant was primarily liable for the lawful transportation charges, and the weight of authority is to the effect that such liability can only be released by payment," which was true in

and of that case. In that case the Supreme Court of Illinois deemed it worthy of mention that:

> "At the time it delivered the coal to Cook & Co., the plaintiff demanded of the former payment of the freight, but the same was not paid. That several other demands were made of Cook & Co., but without avail; and on Sept. 19, 1912, plaintiff brought suit against Cook & Co. and recovered a judgment for the amount of the freight, which judgment still remained unsatisfied."

In the case of L. & N. R. R. Co. v. Maxwell, 237 U. S. 94 (59 L. Ed. 853) the defendant purchased from the plaintiff direct, a ticket from Nashville to some other point, and the only question which was, or which could have been decided, was whether the fact that the plaintiff's agent stated to defendant before he purchased the ticket a rate less than the true one, constituted a defense to the action by the carrier for the difference between that quoted to, and collected from, defendant at the time he purchased the ticket, and the true rate.

There the defendant was the party, and the sole party, besides the carrier, to the transaction. Neither had the defendant in consequence of the error of plaintiff's agent, changed his position for the worse. The remarks of Mr. Justice Hughes in that case are not applicable to the case at bar.

In Jobbit v. Gounday, 29 Barb. 509, cited in Wells Fargo & Co. v. Cuneo, 241 Fed. 727, in the quotation from the latter case contained on p. 25 of brief of plaintiff in error, the question was whether the plain-

tiff, carrier, released defendant, **owner, consignor and shipper,** by delivering the goods to the consignee and taking his check for the freight. In that case it is stated that the goods shipped **were the property of the consignor, shipper and defendant.**

In Chicago V. N. W. R. Co. vs. Queenan, 102 Neb. 391, the shippers or consignors were making a sale of the hay in question direct to the consignee (though f. o. b. initial point); and the opinion contains the statement that the bill of lading was a straight one. It also emphasizes the fact that the hay was consigned to South Omaha, and that the Nebraska Railway Commission had provided that: "Shipments of hay for Omaha or South Omaha must not be received unless charges are prepaid or guaranteed." —drawing, as we think, attention to the fact that if pre-payment or guarantee had been demanded, defendants would have made or guaranteed payment.

This case cites, and quotes with approval from the case of Cin. N. O. & T. P. R. R. Co. v. Vredenburgh Saw Mill Co., 13 Ala., Ap. 442.

The latter case was decided June 20, 1915, long before the Collins case; and furthermore, in that case the Alabama Court of Appeals say:

> "There was an implied contract that it would, as the shipper **who had on its own account** engaged the services of the plaintiff as carrier, pay the legally established transportation charges if the consignee should refuse to accept the shipment and pay the lawful charges. Otherwise there would be no way in those cases where the consignee rightfully refuses to accept the shipment and is not re-

sponsible for the charges of carriage, to enforce the statutes requiring common carriers, under stipulated penalty, in case of failure to exact and collect lawful published and established rates and charges."

In this case the consignee declined to accept the lumber in question, defendant was notified, and declined to pay the freight, and the lumber was sold by the plaintiff for the charges, and did not bring a sufficient sum to cover them.

The bill of lading seems to have been a straight, standard one, in which there were only two parties, consignor (defendant) and consignee.

The case of Union Freight R. R. Co. v. Winkley, 159 Mass. 133, was decided by the Supreme Court of Massachusetts in 1893, Mr. Justice Holmes being at the time a member of the court. The court there say:

"A consignor of merchandise delivered to a railroad for transportation may be the owner and act for himself, or he may be an agent for the owner and act for him, and this may or may not be known to the railroad company. From the agreed facts it appears that the title to the ice passed to Merrick when it was put on board the car, and that it was transported at his risk. The doctrine of the courts of the United States seems to be that the property in goods shipped is presumably in the consignee, although this presumption may be rebutted by proof."

The case of Finn v. Western R. R., 102 Mass. 283, referred to in Un. Frt. Railroad v. Winkley, 159 Mass. 133, was one by the carrier against the shipper. In that case, the Supreme Court of Massachusetts, in speaking of the liability of a common carrier say:

"Prima facie, his contract of service is with the party from whom, directly or indirectly, he receives the goods for carriage; that is, with the consignor. When carrying goods from seller to purchaser, if there is nothing in the relations of the several parties except what arises from the fact that the seller commits the goods to the carrier as the ordinary and convenient mode of transmission and delivery, in execution of the order or agreement of sale, the employment is by the seller, the contract of service is with him, and actions based upon that contract may, if they must not necessarily be in the name of the consignor. If, however, the purchaser designates the carrier, making him his agent, to receive and transmit the goods, or if the sale is complete before delivery to the carrier, and the seller is made the agent of the purchaser in respect to the forwarding of them, a different implication would arise and the contract of service might be held to be with the purchaser. Although this was not a suit to recover freight, the principles on which it was decided are applicable to such a suit, and the effect of this and the previous decisions, we think, is that in this Commonwealth, when the vendor of goods delivers them to a railroad to be carried to the purchaser, although the title passes to the purchaser by the delivery to the railroad company, and the name and address of the consignee, who is the purchaser, is known to the company, the vendor is presumed to make the contract for transportation with the company on his own behalf, and is held liable to the company for the payment of the freight. This presumption, however, is a disputable one, and may be rebutted or disproved by evidence; and if the vendee has ordered the goods to be

sent at his risk, and on his account, he also may be held liable as the real principal in the controversy." Then follows the quotation contained on pages 22 and 23 of our brief, from the opinion in the case of U. Frt. R. R. Co. v. Winkley, 159 Mass. 133 (38 Am. St. Rep. 398-402).

In Cent. Ry. of N. J. v. MacCartney, 68 N. J. Law 165 (52 Atl. 575), Mr. Justice Pitney, then a member of the Supreme Court of New Jersey, said:

"Prima facie the consignor of freight, who contracts with the carrier for its shipment, is liable to pay the charges of transportation. It is by him that the engagement is made with the carrier. **It is for him that the service is performed.** The question of his liability, however, is in each instance, dependent upon the terms of the agreement actually made between him and the carrier. Whether the consignor is shipping for his own account, or as agent of another, whether he is the owner of the goods; whether by the agreement between him and the consignees, the title to the goods passes to the latter at the time of delivery to the carrier, or upon delivery to the consignee,—these and other like circumstances have been discussed in the adjudicated cases as evidential upon the question of consignor's liability to the carrier for the freight."

The facts in that case were similar to those of the case at bar, and that case is in all essential respects, analogous to this.

The shipment there was interstate commerce, all of the cross-ties in question having been shipped from Brooklyn, N. Y., a part to Bound Brook and the remainder to Dunellen, both in the State of New Jersey. While the fact that the shipment constituted interstate

commerce is not specially referred to in the opinion, it is inconceivable that that fact should have escaped the attention of counsel on both sides and the court. The case was decided on June 9, 1909, and the shipment involved was made on July 2, 1898, long after the Interstate Commerce Act went into effect. In that case the court refer to the difficulties attending the collection from the party primarily liable, by either the plaintiff or the defendant, and state that that burden is properly on the carrier.

We therefore submit that none of the cases cited in the brief of counsel for plaintiff in error, nor any of those referred to in the cases so cited, are analogous to the case at bar, or constitute authority for the position taken by plaintiff in error, or against that of defendant in error; but all of the statements, remarks and observations contained therein, while perhaps true and correct in the connection in which they are made or employed, are so because of the particular facts of the respective cases in which such statements were made, and never would have been made or employed by the courts making or employing them, if the facts of the case under discussion had been those in the case at bar.

As showing the relation of the defendant in error to the bills of lading in this case, and to the coke covered thereby, and that this relation was known to the initial carrier, and every other carrier handling the coke, we beg to draw the attention of the Court to the following portions of the bills of lading:

In the body of the bill of lading itself, at the bot-

tom of page 50 of the transcript, is found the following provision:

> "And which are agreed to by the shipper and accepted for himself and his assigns."

It will be observed that the expression "his assigns" here employed, was not intended to apply to the defendant in error. The defendant in error could not have assigned the bill of lading, or made of it any disposition whatsoever, not having in the transaction such part, or to the bill of lading such relation as to authorize it to do so.

Next, near the top of page 51 of the transcript is found the provision "The surrender of this Original order Bill of Lading **properly endorsed** shall be required before the delivery of the property." It will be observed that the expression "properly endorsed" here used, means endorsed by Tutwiler & Brookes, who were the consignees, and as such, the owners of the coke.

Next, the following expression:—"inspection of property covered by this bill of lading will not be permitted unless provided by law, or unless permission is endorsed on this original bill of lading or given in writing **by the shipper.**"

It is clear that this provision was designed to cover inspection at destination by Great Western Smelters Corporation. If permission for such inspection had been endorsed on the original bill of lading by the defendant in error, it would, in making such endorsement, have been acting as agent for, and under direction from Tutwiler & Brookes. It may be that the

permission referred to or contemplated by the expression "**or given in writing by the shipper**" was intended to cover such written permission given, either after the arrival of the coke at destination, or if not that, then at some time after the issuance of the bill of lading and before delivery. It is clear that after the issuance and delivery of the bill of lading, the defendant in error had no authority to grant or permit inspection of the coke, and that neither the initial carrier, the delivering carrier nor any connecting carrier would have honored or recognized or acted upon a writing by or from the defendant in error, instructing the carrier to permit inspection of the shipment.

Next, that portion of Section 1 of the Conditions contained on the back of the bill of lading, which is found at the bottom of page 53 and the top of page 54 of the transcript, as follows:

> "Except in case of negligence of the carrier or party in possession, the carrier or party in possession, shall not be liable for loss, damage, or delay occuring while the property is stopped and held in transit upon request of the **shipper, owner, or party entitled to make such request.**"

It is here again obvious that the property would not be stopped or held in transit upon request of the defendant in error, and that no carrier having possession of the property would have recognized or acted upon any request of the defendant in error in reference to stopping, holding in transit or otherwise dealing with the shipment. The fact that the word "shipper"

is here employed can not be taken to mean that in this case, the defendant in error had the conceded right to require the property stopped, or held in transit; but that the word "shipper" was included, along with "owner" in this printed form, in order to make the form applicable to general use, and the word shipper was to have application where the conditions and circumstances of the transaction or shipment were such as to confer on the shipper the right to direct the handling of the goods.

Next, in this same Section 1 of the Conditions printed on the back of the bill of lading, there occur three separate and distinct references to handling of the goods under certain conditions, found in the second paragraph, and at about the middle and near the bottom of page 54 of the transcript; in which it is provided that, "in case of quarantine the goods may be discharged at risk and expense of **owners,**" and again, "or goods may be returned by carriers at **owner's** expense and risk," and again, "quarantine expenses of whatever nature or kind upon or in respect to goods shall be borne by the **owners** of the goods."

It is clear that in neither of these cases does the word "owner," "owner's" or "owners," as here employed, apply, nor was it intended to apply, nor would there have been by the carrier any attempt to make them apply to the defendant in error; but that in each and every instance, was intended to apply to the person occupying the position of Tutwiler & Brookes.

Again, at the beginning of Section 4 of these Conditions, found at about the middle of page 56 of the

transcript, and in Section 5 at about the top of page 57, and again in Section 5 near the bottom of page 57, the expression **"owner's"** or **"owner's cost"** and **"owner's risk"** are employed, and it is clear that they were employed, and would have been by both the carrier and the person adversely interested, construed to mean and to apply to Tutwiler & Brookes, and not to the defendant in error.

Again, in the form of bill of lading referred to and in part set out on pages 29 and 30 of our original brief, if under the provision,

> "Nothing herein shall limit the right of the carrier to require at time of shipment the pre-payment or guarantee of the charges."

the carrier should see fit to require, at the time of shipment, the pre-payment or guarantee of the charges, it is clear that it would be of the person occupying the relative position of Tutwiler & Brookes, and not that of the defendant in error, that such requirement would be made.

Therefore we submit that not only the testimony of H. M. Brooks, on pages 94 and 95 of the transcript, but the very terms of the bill of lading itself, show that the relation of the defendant in error to this coke was known to the initial carrier at the time it accepted the coke for shipment, and to every connecting carrier into whose hands it subsequently came; and that this relation was not such as to render it liable for the carrying charges, but such as to render it not so liable.

We therefore submit that, on the facts of this case,

(apart from the variance between the allegations and the proof, hereinafter mentioned), the defendant in error is not liable for this overcharge; that the ruling of the District Court was free from error; that the cause was properly affirmed by the Circuit Court of Appeals; and that there is no error in the record as presented to this Court.

In the first place, the relation of the defendant in error to the coke in question and to the bill of lading was not such as to render it liable for the freight on the same; and in the second place, if it had been so liable in the first instance, it was not liable for the overcharge in view of the manner in which the shipment was handled by the A. T. & S. F. Ry. Co., the delivering carrier.

But apart from these considerations, and irrespective of whether the defendant in error was liable under the facts of the case, the ruling of the District Court was correct, for the reason that there was a fatal variance, or rather several fatal variances, between the allegations of the complaint and the proof in the case.

The Judicial Code provides that:

In Federal Courts, the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of Court to the contrary notwithstanding.

(R. S. Sec. 914; Act June 1, 1872, ch. 255, Sec. 5, 17 Stat. L. 197.)

4 Fed. Stat, Ann. Sec. 914.

Sawyer v. White, 122 Fed. 227.

Roberts v. Lewis, 144 U. S. 656.

The provisions of the Code of Alabama in reference to pleadings, and evidence thereunder are as follows:

"The defendant may plead more pleas than one without unnecessary repetition; and, if he does not rely solely on a denial of the plaintiff's cause of action, must plead specially the matter of defense. In all actions for defamation, or for injuries to the person, or to real personal property, the general issue is "not guilty," and puts in issue all the material allegations of the complaint; in all other actions the general issue is an averment that the allegations of the complaint are untrue, and except as may be otherwise provided, puts in issue only the truth of such allegations."

Alabama Code of 1907, Sect. 5331.

Under these provisions, the Supreme Court of Alabama has uniformely held that where the defendant interposes a plea of the general issue, the burden is on the plaintiff to establish all of the material averments of the complaint, and upon his failure to do so the general affirmative charge for the defendant is properly given.

It is likewise uniformly held that a plaintiff, by including in his complaint the averment of certain facts, renders such facts material, and assumes the burden of making proof of them, although such facts may not be otherwise material to his case; and that his

failure to make proof of facts so alleged is fatal to his right to recover.

It has been held by the Supreme Court of Alabama that:

"In an action of a written promise to pay $150.00, in consideration, as therein expressed of plaintiff's "relinquishment of his lease" of certain premises, of which he was in possession under an alleged lease for a term of years; or, as expressed in the writing signed by plaintiff, of "all right and claim to said premises under said lease;" the validity of the lease, or the term for which it is valid, is not an element of plaintiff's right to recover; it is immaterial whether his relinquishment was a technical surrender of the lease, an assignment of it to the defendant, or merely a general divestiture of plaintiff's rights under it; nor is it necessary for him to show that he surrendered possession to the defendant. Yet, having alleged in his complaint that he agreed to surrender, and did surrender, the lease and possession to the defendant, these averments become material, and he cannot recover without proving them."

Dexter v. Ohlander, 89 Ala., 262., (7 So. 115.)

And the Court there proceeds to say:

"Therefore, to the cause of action shown by the proof it was not essential that plaintiff should have technically surrendered the lease to defendant, or should have assigned it to him, or relinquished it in the sense of vesting his rights under it in the defendant; nor was it necessary for the plaintiff to have surrendered the possession to defendant.

Yet, the plaintiff in the first count of the complaint, alleges, and thus assumes the burden of proving,

that he agreed to surrender, and did surrender the lease to the defendant; and in the second count, it is negatively alleged that the contract there declared on required a surrender and delivery of possession to the defendant, and that plaintiff, in compliance with this contract, did so surrender possession to Dexter.

The plaintiff thus took upon himself to prove these facts, which we think are not material to his rights in the abstract, but only as he has asserted them.

If he failed to prove a surrender of the lease to the defendant, he was not entitled to recover under the second count; and if the jury had found that he had surrendered neither the lease nor the possession to the defendant, he was not entitled to recover at all.

Dexter v. Ohlander, 89 Ala. 262 (271) 7 So. 115.

Citing.

Alabama, Gt. So. R. R. Co. v. Mt. Vernon Co., 84 Ala. 173.

Where it is held:

"A recovery cannot be had against an intermediate or connecting carrier, operating part of a continuous route, under a complaint framed as against the receiving carrier, since the contract and liability of the two are materially different."

Citing Montg. & Eufaula R. Co. v. Culver, 75 Ala. 587, which is to the same effect.

And in the case of Alexander v. Woodmen of the World, 161 Ala. 561 (565) the Supreme Court of Alabama say:

"Plea No. 1 was the general issue, and merely denied the allegations of the complaint, as to which there was, and could be, no special replication. This, of course, placed the burden of proof upon the plain-

tiff to prove the averments of the complaint, before he was entitled to a verdict, or before one could be rendered against the defendant."

And in Murphy v. McAdory, 183 Ala. 209 (62 So. 706,) the Court say:

> "The first and third counts, grounded on a false imprisonment, declare that the act was **maliciously** done. While malice is not an essential element of false imprisonment, yet when the offense is thus characterized in the complaint, malice must be proved or the case fails."

And in Harris v. Sanders, 186 Ala. 350;

> "In an action against two persons jointly for the value of the services of a physician and surgeon, rendered at their request, proof that the services were performed at the request of only one of the defendants, was fatally variant with the complaint, and would not support a judgment against that defendant alone."

And in Strain v. Irwin, 195 Ala. 414, the Court say:

> "Where plaintiff pleaded an illegal arrest, he thereby anticipated the defense of justification, and unnecessarily assumed the negative burden of proof; hence, a plea setting up justification under legal process or legally authorized action, was unnecessary."

See also

U. S. Health & Accident Ins. Co. v. Savage,
185 Ala. 232;
Wilkinson v. King 81 Ala. 156;
Milton v. Haden, 32 Ala. 30.

In this case the defendant, in addition to its special pleas, numbers 3 to 12, pleaded the general issue, which was set up in its two separate pleas Nos. 1 and 2, shown on page 14 of the transcript.

It will be noted by reference to the complaint in this cause, found on pages 4, 5 and 6 of the transcript, that the plaintiff made therein the following averments:

(1) "Defendant is a corporation **organized and existing under the laws of the State of Alabama, and is a citizen of the State of Alabama."**

(2) "At the top of page 5 of the transcript, **that the freight claimed was earned by the plaintiff and its connecting carriers on shipments carried for defendant."**

(3) "Said shipments were carried over the route directed **and safely delivered to the consignee named in the bills of lading."** (See transcript near the bottom of page 5.)

It will be noted that, not only are Tutwiler & Brookes in fact the consignee, but the plaintiff had already specifically stated in its complaint that they were such consignee. (See transcript near the top of page 5.)

(4) The complaint also contains the further averment that, "There is a balance due **from the defendant** therefor of $3,463.46, etc., (See transcript bottom page 5 and top of page 6.)

(5) The Complaint also contains the averment that prior to the institution of the suit **there had been made upon the defendant demand for the payment of the amount sued for.** (See transcript top of page 6, where is found the following averment, **"which the defendant has failed and refused to pay though often requested to do so."**

It may be that some, and possibly all of these averments were, in and of themselves, not essential or material; and that the complaint would have been sufficient without them. But the plaintiff, having made them in its complaint, was required to prove them before it was entitled to a verdict or judgment.

In reference to the first averment above mentioned, namely, the State under whose laws the defendant corporation was organized, and the defendant's residence. We are not now considering the manner in which it was necessary for the defendant to present the question of the jurisdiction of the Court over its person, but the question of a variance between this averment and the proof. The defendant did, in fact, interpose pleas in abatement to the jurisdiction of the Court over both the subject matter of the suit and also the defendant's person; and these are found on page 9, 10, 11, 12 and 13 of the transcript. But the record shows no ruling by the District Court on these pleas.

But apart from the question of jurisdiction, the plaintiff made this averment material by including it in its complaint; and having failed to make proof of it, the defendant was entitled to the general affirmative charge in its favor.

Next, in reference to the averment that this shipment was carried for the defendant:

It is not sufficient for the purposes of the present question that the goods may have been carried under such circumstances as to render the defendant liable for the charges thereon, but, in order to recover under this complaint, the plaintiff was required to prove that the coke was carried for the defendant.

Next, in reference to this averment that the coke was "safely delivered **to the consignee named in the bills of lading."**

It will be borne in mind that the question now under consideration is not whether the delivering carrier made of the coke a valid delivery; that is to say, a delivery to the proper party; or a delivery which would relieve it from liability if sued for a failure to deliver; but it averred in its complaint, near the top of page 5 of the transcript, that the coke in question was delivered to it, "for shipment **to Tutwiler & Brookes as consignee;"** and further on in its complaint, at the bottom of page 5 of the transcript, avers that, "said shipments were carried over the route directed and safely **delivered to the consignee named in the bills of lad-ind."**

The fact that if sued for failure to deliver this coke the plaintiff or the delivering carrier could acquit itself from liability by showing delivery to Great Western Smelters Corporation does not answer the question now under consideration. In order to conform to the proof in the case as contained in the record, the averment should have been that delivery was made to Great Western Smelters Corporation, or to the person entitled to receive delivery, or that proper delivery was made; and if this had been done, the proof in the record would have been sufficient to support the aver-

ments of the complaint on that point. But the complaint plainly and specifically avers that delivery was made **to the consignee named in the bills of lading;** whereas the proof shows without controversy that delivery was not made **to the consignee named in the bills** of lading, but to an entirely different, separate and distinct person, namely Great Western Smelters Corporation.

So, in reference to the averment that this balance is due from the defendant, found at the bottom of page 5 of the transcript. This may not be quite so strong or clear as the other instances mentioned, but we submit that, in order to conform to the proof, the complaint should have alleged that, while this balance was due from Great Western Smelters Corporation, or from Tutwiler & Brookes, the defendant was, under the circumstances stated in the complaint, liable to the defendant for it.

In reference to the concluding averment that demand had been made upon the defendant for this amount prior to the institution of the suit:—here again the Court will bear in mind that the question now under consideration is not whether a demand was necessary as a predicate for the suit. Such demand may not have been necessary; and, other necessary elements being present, the plaintiff might have been able to maintain the suit without proof of prior demand. But the plaintiff chose to make specific averment **that demand had been made of the defendant for the payment of this over-charge;** whereas there is absolutely no proof of such demand.

It may be that the rule in Alabama in reference

to the correspondence or conformity between the allegations and the proof is rather strict and technical. (We confess that we do not know how it compares with the rules of other states on the same subject); but it is the rule, and is uniformly followed; and under the Federal Statutes, is to be followed by the Federal Courts of that State.

We submit that in the cases above cited from the Supreme Court of Alabama the matters alleged and not proven, and for failure to prove which the plaintiff failed, were in themselves, no more essential, important or material than the several matters alleged in this complaint and pointed out above, none of which were proven, and some of which were absolutely disproven by the undisputed testimony; and that, apart from other and more important considerations, for this reason, and on this ground, the plaintiff was not entitled to recover, and the general affirmative charge for the defendant was properly given by the learned Judge of the District Court, and the case properly affirmed by the Circuit Court of Appeals.

Lest this Court should conceive of the Supreme Court of Alabama, and the rule there in force on this subject, an unfavorable impression, we draw the attention of the Court to the fact that the Supreme Court of Alabama, recognizing the existence of the rule above stated, of the fact that it is and must be followed by the Courts of that State, from a commendable desire to prevent injustice resulting from its application, has adopted the following rule, which will be found in the front of Vol. 175 Alabama Reports:-

"Rule 34. Variance; Special Objection Making

Point; General Charge.—In all cases where there is a variance between the allegations and proof, and which could be cured by an amendment of the pleading, the trial court will not be put in error for admitting such proof unless there was a special objection making the point as to the variance. And the general objection that the same is illegal, irrelevant and immaterial, will not suffice. Nor will the trial court be put in error for refusing the general charge predicated upon such a variance unless it appears from the record that the variance was brought to the attention of the said trial court by a proper objection to the evidence."

It will be observed that the effect of this rule is that the trial court will not be put in error because of an obscure and unobserved variance between the allegations and the proof; but that the rule does not operate to put the trial court in error. For example, if in this case the verdict had been for the plaintiff, and error had been predicated or assigned upon some ruling of the trial court which was erroneous because of one or more of the variances above pointed out, the case would not be reversed unless the variance had been brought to the attention of the trial court at the time of the trial. But the verdict and judgment being in favor of the party opposed to that between whose pleadings and the proof the variance or variances existed, it is not necessary for it to appear that the trial court based its (correct) ruling upon such variance or variances.

We assume that this Court does not view with favor the decision of cases upon mere technicalities; but we feel equally safe in assuming that the Court will administer the law as it finds it; even though it may

lead to a result which the Court might more or less regret.

We suggest further that as righteous a judgment as that rendered in this case should be approved and affirmed if there can be found any legal ground for approval and affirmance. And beyond question that ground is found in the point last above made.

We repeat, that in this case, in the first place, the defendant in error was not, in the first instance, and never was, liable for this under-charge; that in the second place, if its relation to the coke in question, the shipment, the bill of lading, and the entire transaction, was such as to make it liable if the shipment, the collection of the freight, etc., had been properly handled by the delivering carrier, it was released by the manner in which the delivering carrier handled the transaction; under the principles and rules announced and followed in Yazoo & M. V. Ry. Co. v. Zemurray, 238 Fed. 789, and Western Railway of Alabama v. Collins, 201 Ala. 455; 78 South. 833, and in other cases in which the same general principles of equity and justice are found and followed; and lastly, that, other questions apart, the defendant in error was entitled to the general affirmative charge in the District Court because of one, several or all of the variances above pointed out between the allegations of the complaint and the proof in the case.

We therefore submit that there was no error in the rulings of the District Court; nor in those of the

Circuit Court of Appeals, and that this case should be affirmed.

Respectfully submitted,

HENRY A. JONES,

Attorney for Central Iron & Coal Co.,

Defendant in Error.

Allan C. Rearick,

A. C. Travis,

DeVane K. Jones,

Adrian V. Van de Graaff,

Of Counsel.